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ASA'ARI MUDA

v.

KERAJAAN MALAYSIA & ORS

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL AZIZ MOHAMAD JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO. W-01-17-2002]

C

24 JULY 2006

PUBLIC SERVANTS: *Service - Transfer to statutory authority - Plaintiffs exercised option for transfer - Whether plaintiffs entitled to pension benefits - Inland Revenue Board of Malaysia Act 1995, s. 15 - Pensions Act 1980, ss. 3, 12*

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The plaintiff and all those he represented ('plaintiffs') were government officers in the Department of Inland Revenue ('the Department'). When the collection of revenue was privatised, the plaintiffs exercised the option for transfer to the Inland Revenue Board ('the Board') that was constituted under the Inland Revenue Board of Malaysia Act 1995 ('the IRB Act'). The IRB Act came into force on 1 March 1996. It was not disputed that pensionable officers who would have attained the age of forty on 29 February 1996 were allowed to go on optional retirement under s. 12(1) of the Pensions Act 1980 before they were appointed as employees of the Board on 1 March 1996. For those who had not attained the age of forty on 29 February 1996, they became employees of the Board but were entitled to terms and conditions including the pension scheme that applied to them as public officers by virtue of s. 15 of the IRB Act. In 1997, the Board introduced a new scheme wherein such employees were given an option to contribute to the Employees Provident Fund ('EPF'). Under the EPF scheme, the employees would enjoy higher appointments or promotions. The plaintiffs exercised that option. The plaintiffs then sought declarations in the High Court primarily for pension and gratuity rights. The High Court dismissed their application. Hence, this appeal.

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Held (dismissing the appeal)
Per Gopal Sri Ram JCA; Mohd Ghazali Yusoff JCA concurring:

(1) The Board acted entirely within its statutory powers. The claim to an absolute right to a pension was misconceived as s. 3(1) of the Pensions Act 1980 provided that no officer shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under the Act. Most importantly, the plaintiffs, before they exercised their option to be transferred to the Board, were briefed in full about the terms of service they would be subjected to. The plaintiffs exercised the option with their eyes wide open. Having made their choice, they must be held to their word. Otherwise it would be impossible for the Board to conduct its affairs and make financial provision for its employees' wages and other emoluments. (paras 4 & 5)

Per Abdul Aziz Mohamad JCA:

(1) The appellants' case was not a case of retirement under s. 12A(1) of the Pensions Act 1980. The word "may" in the following phrase "... may be deemed to have retired ..." in s. 12A(1) of the Pensions Act 1980 should mean may and not shall. The provision was not in anticipation of claims by pensionable officers that their case fell under the section. It is intended to give power to the government on whether to treat a case of leaving the public service to take up an appointment of the kind specified as a case of retirement from the public service. Further, by s. 15 of the IRB Act, Parliament had provided a special avenue for officers of the Department to leave the public service and join the Board. Parliament, could not, without so indicating by express words, have intended that the avenue provided by s. 12A(1) should also be applied. If Parliament had so intended there would have been some bridging words to link the two sections. (para 15)

Bahasa Malaysia *translation of headnotes*

Plaintif dan orang-orang lain yang diwakilinya ('plaintif-plaintif') adalah pegawai kerajaan yang bertugas di Jabatan Hasil Dalam Negeri ('Jabatan'). Apabila pemungutan hasil diswastakan, plaintif-plaintif telah memilih untuk dipindah ke Lembaga Hasil Dalam Negeri ('Lembaga') yang ditubuh di bawah Akta Lembaga Hasil Dalam Negeri Malaysia 1995 ('Akta LHDN'). Akta LHDN mula

berkuatkuasa pada 1 Mac 1996. Tidak dinafikan bahawa, sebelum dilantik sebagai pegawai Lembaga pada 1 Mac 1996, pegawai-pegawai berpencen yang berumur 40 tahun pada 29 Februari 1996 telah dibenar bersara optional di bawah s. 12(1) Akta Pencen 1980. Sementara bagi mereka yang tidak mencapai umur 40 tahun pada 29 Februari 1996, mereka menjadi kakitangan Lembaga tertakluk kepada terma-terma dan syarat tertentu, termasuk kepada skim pencen yang terpakai kepada mereka sebagai pegawai awam di bawah s. 15 Akta LHDN. Pada tahun 1997, Lembaga memperkenalkan satu skim baru di mana mereka yang di dalam skim pencen tersebut diberi pilihan sama ada untuk menyumbang ke Kumpulan Wang Simpanan Pekerja ('KWSP'). Di bawah skim KWSP, pekerja-pekerja menikmati promosi dan perlantikan yang lebih baik dan plaintif-plaintif dengan itu memilih skim tersebut. Berikutnya plaintif-plaintif memohon untuk deklarasi bahawa mereka berhak kepada pencen dan hak-hak gratuiti. Permohonan bagaimanapun ditolak oleh Mahkamah Tinggi dan plaintif-plaintif merayu.

Diputuskan (menolak rayuan):

Oleh Gopal Sri Ram HMR; Mohd Ghazali Yusoff HMR menyetujui:

(1) Lembaga bertindak mengikut kuasa-kuasa statutnya. Tuntutan untuk mendapat pencen sebagai suatu hak mutlak adalah tersasar kerana s. 3(1) Akta Pencen 1980 memperuntukkan bahawa tiada pegawai berhak kepada pampasan atas perkhidmatan mereka atau kepada apa-apa pencen, gratuiti atau manfaat-manfaat lain di bawah Akta sebagai suatu hak mutlak. Lebih penting, plaintif-plaintif, sebelum membuat pilihan untuk dipindah ke Lembaga, telah diberikan sejelas-jelas penerangan tentang terma perkhidmatan mereka. Plaintif-plaintif telah melaksanakan pilihan mereka dengan penuh kesedaran dan pengetahuan. Oleh itu, setelah membuat pilihan, mereka harus terikat kepadanya. Jika tidak, Lembaga tidak dapat menjalankan tugas-tugasnya atau membuat peruntukan-peruntukan penggajian dan emolumen-emolumen lain untuk pekerja-pekerjanya.

Oleh Abdul Aziz Mohamad HMR:

(1) Kes perayu bukan suatu kes persaraan di bawah s. 12A(1) Akta Pencen 1980. Perkataan "may" dalam ungkapan "... may be deemed to have retired ..." dalam s. 12A(1) Akta Pencen

1980 bermaksud "may" dan bukannya "shall". Provisi ini bukan untuk menghadapi tuntutan oleh pegawai-pegawai berpencen bahawa kes mereka dirangkumi oleh seksyen tersebut. Ia bertujuan untuk memberi kuasa kepada kerajaan sama ada untuk menganggap kes peninggalan perkhidmatan awam bagi mengambil jawatan yang diperkatakan sebagai kes persaraan dari perkhidmatan awam. Selain itu, melalui s. 15 Akta LHDN, Parlimen telah memperuntuk jalan keluar khas bagi pegawai-pegawai Jabatan untuk meninggalkan perkhidmatan awam dan memasuki perkhidmatan Lembaga. Tanpa ungkapan-ungkapan yang jelas, Parlimen tidak boleh dikata sebagai berniat bahawa jalan keluar seperti yang diperuntukkan oleh s. 12A(1) hendaklah juga dilaksanakan. Jika itu yang diniatkan Parlimen, harus wujud perkataan-perkataan penyambung di antara kedua-dua seksyen tersebut.

Case(s) referred to:

Hj Wan Othman v. Government of Malaya [1965] 2 MLJ 31 ***(refd)***
Kiriri Cotton Co Ltd v. Dewani [1960] AC 192 ***(refd)***
Lionel v. Government of Malaysia [1971] 2 MLJ 172 ***(refd)***
Olga Tellis v. Bombay Municipal Corp AIR [1986] SC 180 ***(refd)***
Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC ***(refd)***

Legislation referred to:

Inland Revenue Board of Malaysia Act 1995, s. 15(3)
Pensions Act 1980, ss. 3(1), 7, 12(1), 12A(1)
Statutory and Local Authorities Pensions Act 1980, s. 6B

For the appellant/plaintiff & all those he represented - N Mahalingam; M/s Maha & Peri
For the respondents/defendants - Alice Loke SFC

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-21-06-2000]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

[1] The plaintiff and all those whom he represents (whom I will refer to as "the plaintiffs") are servants of the first defendant, the Government of Malaysia. They were employees of the Department of Inland Revenue ("the Department"). And they claim that they

had, by reason of their employment, acquired the right to a pension under s. 7 of the Pensions Act 1980. In 1995, the collection of revenue was privatised. A Board, called the Inland Revenue Board ("the Board") was constituted under the Inland Revenue Board of Malaysia Act 1995 ("the IRB Act") which came into force on 1 March 1996. For present purposes, s. 15 of the IRB Act is important. Because the plaintiffs rely heavily on it. And this is what it says:

> 15(1) The Board shall on the appointed day accept into its employment every person who immediately before that date is in the employment or service of the Inland Revenue Department, Malaysia, and who was given an option by the Government of Malaysia and has opted to serve as an employee of the Board.
>
> (2) Every such person who opts under subsection (1) to serve as an employee of the Board shall be employed by the Board on terms and conditions of service not less favourable than the terms and conditions of service to which he was entitled to immediately before the date mentioned in subsection (1).
>
> (3) Until such time as terms and conditions of service including the conduct and discipline of its employees are drawn up by the Board, the scheme and terms and conditions of service including the conduct and discipline of employees of the Government shall *mutatis mutandis* continue to apply to every person employed by the Board under subsection (1).

[2] After the IRB Act came into force, the plaintiffs, all of whom were below 40 years of age at the material time, were given the option to transfer their service with the Department to the Board. The plaintiffs exercised this option. They then became employees of the Board. This was with effect from 1 March 1996, that is to say, the date on which the IRB Act came into force.

[3] Later, in 1997, the Board introduced a new scheme – the IRB Scheme – containing the conditions of service of those employees who had opted to transfer their service with the Department to the Board. This, of course, included the plaintiffs. I would pause and mention that the Board in acting as it did was no doubt exercising its powers under s. 15(3) of the IRB Act. Having introduced IRB Scheme the Board gave the plaintiffs the option of being employed under that Scheme or to continue under the existing Scheme A. There were differences between the two Schemes. Under Scheme A the plaintiffs were *prima facie* entitled to receive a pension on their retirement. That was not the case

under the IRB Scheme. However, the IRB Scheme had other features that made it substantially more advantageous to employees than Scheme A. For example, under the IRB Scheme the Board has to make a 17½ % contribution to the Employees Provident Fund Board. This takes into account the period of pensionability that the plaintiffs enjoyed while in the Department. The plaintiffs also received salary warrants under the IRB Scheme which they would not have received had they opted to remain with the Department. The plaintiffs consciously elected to choose the IRB Scheme. But they felt that they had suffered harm as a result because, according to them, they have lost their right to receive a pension. They brought an action to assert their claim. The High Court dismissed it. They appealed to us. We dismissed their appeal.

[4] I find the plaintiffs' claim to be without any merit, as did the learned trial judge, Abdul Hamid Said J, a judge with much experience in service matters. Here you have a case where the Board was acting entirely within its statutory powers. Second, the claim to an absolute right to a pension is misconceived. For, s. 3(1) of the Pensions Act 1980 expressly says that "No officer shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act." See also *Haji Wan Othman v. Government of Malaya* [1965] 2 MLJ 31. Of course, a civil servant who has not misconducted himself has a legitimate expectation to receive a pension on his retirement. But such an expectation does not arise on the facts here. And that brings me the most important point in the case.

[5] There is a third reason why the plaintiffs must fail. It is apparent from the evidence on record that the plaintiffs had, prior to their exercise of the option to be transferred to the Board, been briefed in full about the terms of service they would be subject to in the event they opted to be transferred to the Board. One of the paragraphs in the papers made available for the briefing very clearly states that if the Department's employees opted to accept the Board's service conditions then their pensionable status would cease but that this would be substituted with contributions to the Employees Provident Fund. So the plaintiffs knew all about it and they came in with their eyes open wide. Having made their choice – not once but on two occasions – they must be held to their word. Otherwise it would be

impossible for the Board to conduct its affairs and make financial provision for its employees' wages and other emoluments. In short it would not be fair to the Board.

[6] Let me make it absolutely clear that this is not a case where the plaintiffs were contracting out of a statutory protection conferred upon them by Parliament. Had that been the case, then their opting to the IRB Scheme would not be enforceable against them. For it is settled law that where a statute is passed for the benefit or protection of a class one or more members of that class cannot waive the benefit or protection or contract out of the provisions of that statute. See, *Kiriri Cotton Co Ltd v. Dewani* [1960] AC 192; *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266. Nor is this a case where there has been a waiver or contracting out of the Constitution. For it is equally well settled that you cannot contract out of any of the provisions of the supreme law, especially the fundamental rights it guarantees. See, *Lionel v. Government of Malaysia* [1971] 2 MLJ 172, where Ong CJ said:

> Just as it is impossible to contract out of the provisions of rent control legislation, a *fortiori* must the terms of the appellant's appointment (including regulation 36 of General Orders, Chapter D) be invalid where it is inconsistent with the Constitution.

[7] In *Olga Tellis v. Bombay Municipal Corp* AIR [1986] SC 180, a 5 member Bench of the Indian Supreme Court held as follows:

> There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. There can also be no waiver of fundamental rights. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits.

[8] To sum up, the Government of Malaysia, the first defendant in these proceedings was *bona fide* exercising its managerial powers when it put the plaintiffs to their election. It informed them fully of the consequences of their choice. Armed with all relevant information the plaintiffs made their choice. They must be held to it. They have suffered no hardship or injury by making their choice. In point of fact they received benefits that they would have never received under Scheme A. Also, there has been no violation of either the Pensions Act 1980 or the IRB Act or the Constitution by any of the defendants to the action. Nor has there been any attempt by the Government or the other defendants to get the plaintiffs to contract out of statutory or constitutional provisions.

[9] As I have already said, the appeal was dismissed. The deposit in court was ordered to be paid out to the Government of Malaysia in full satisfaction of its costs.

[10] My learned brother Mohd Ghazali bin Mohd Yusoff, JCA has seen this judgment in draft and has expressed his agreement with it.

Abdul Aziz Mohamad JCA:

[1] The Inland Revenue Board or Lembaga Hasil Dalam Negeri ("the Board") was established under the Inland Revenue Board of Malaysia Act 1995 ("Act 533"), which came into force on 1 March 1996, to carry out functions in matters relating to taxation that, until then, had been carried out by the Inland Revenue Department or Jabatan Hasil Dalam Negeri ("the Department"). For the effective and efficient discharge of the Board's functions there was a need for the Board to employ pensionable officers in the service of the Department, who were officers in the public service and whose pension, gratuity and other retirement benefits were governed by the Pensions Act 1980 ("Act 227"). To be employed by the Board, which is a statutory authority, these officers had to cease to be public officers.

[2] Were these officers to continue to be public officers they would receive their pension and other retirement benefits when they leave the public service upon one of the several types of retirement that are provided for by Act 227. If they left the public service otherwise than upon any such retirement, for example if they resigned, they would lose their eligibility for the retirement benefits.

[3] So that the pensionable officers of the Department could leave the public service to become employees of the Board without losing their eligibility for retirement benefits, certain arrangements were thought up and implemented, which may be seen in para. 6 of the appellants' skeletal submission in the appeal before us. The Department's pensionable officers who would have attained the age of forty on 29 February 1996 were allowed to go on optional retirement under s. 12(1) of the Pensions Act 1980 and were then appointed as employees of the Board on 1 March 1996. Upon optional retirement, they received the gratuity and pension that they were eligible for under Act 227. The age of forty was chosen because under s. 12(1) of Act 227 optional retirement is allowed only if an officer has attained that age.

[4] As to the Department's officers who had not attained forty on 29 February 1996, they were not eligible for optional retirement and therefore could not go on optional retirement and could not receive pension and gratuity under Act 227. But they were given an option to serve as an employee of the Board under s. 15 of Act 533, which is already set out in the judgment of my learned brother, Gopal Sri Ram JCA. They exercised the option. They were the appellant, and those he represented, in this appeal, who for convenience I shall refer to collectively as "the appellants". It was the respondents' stand that, upon the appellants' thereby becoming employees of a statutory authority, the Statutory and Local Authorities Pensions Act 1980 ("Act 239") applied to them as pensionable employees, where their pension, gratuity and other retirement benefits were concerned.

[5] When the appellants went over to the service of the Board on 1 March 1996, by virtue of s. 15(3) of Act 533 they carried with them the scheme, terms and conditions of service that applied to them as public officers ("the SSB"), including the pension scheme. As envisaged by section 15(3), in October 1996 terms and conditions of service specially for employees of the Board were approved and these came into force retrospectively on 1 March 1996 ("the SSLHDN"). In the SSLHDN there is no pension scheme. Instead, there is the Employees' Provident Fund ("EPF") scheme.

[6] On 3 February 1997 the appellants were given the option whether to transfer to SSLHDN or to remain under SSB. If they chose SSLHDN, they would lose their pensionable status but would instead enjoy the benefits of the EPF scheme. If they chose to remain under SSB, they would continue to be of pensionable status, and would in proper time enjoy the retirement benefits promised by Act 239, but subsequent appointment to a higher post or any subsequent promotion would be on condition that they accept SSLHDN. The appellants opted for SSLHDN and thereby lost their pensionable status but had the benefits of the EPF scheme to look forward to.

[7] It was the respondents' stand that this second option was given by virtue of s. 6B of Act 239.

[8] It was three years later that the appellants sought six declarations from the High Court by an originating summons dated 31 January 2000, whose dismissal resulted in the appeal before us.

[9] I have stated that Act 227 provides for several types of retirement upon which a pensionable officer in the public service may be granted pension benefits under the Act. Among those types are compulsory retirement on abolition of office under s. 10(5)(b), compulsory retirement for facilitating departmental organization under s. 10(5)(c), and retirement on being appointed to serve in an organization under s. 12A.

[10] By prayer 1 the appellants sought a declaration that when they exercised their option "to transfer their service" to that of the Board with effect from 1 March 1996 they were compulsorily retired under s. 10(5)(b) or 10(5)(c) of Act 227 and were therefore eligible for pension and gratuity. Prayer 2 was as follows:

> A declaration that the Plaintiff and Former Employees upon their transfer of service to the service of the Lembaga Hasil Dalam Negeri w.e.f. 1st March 1996 are deemed to have retired from the Federal public service under Section 12A(1) of the Pensions Act 1980 and that they are eligible to be paid pensions and gratuities if they have served the Lembaga Hasil Dalam Negeri for not less than 5 years as provided under Section 12A(3) of the Pensions Act 1980.

It was a claim that theirs was a case of retirement on being appointed to an organization under s. 12A. Under s. 12A(3) five years' continuous service in the organization is required before retirement benefits can be granted. The appellants would have served the Board for five years on 1 March 2001.

[11] It was in the prayer 1 or prayer 2 declaration that actual benefits for the appellants lay. From either declaration they hoped to receive pension and gratuity under Act 227. Prayers 3 and 4 were for declarations nullifying the first and second options. I supposed that what the appellants aimed to achieve by those declarations was the preservation of their status as pensionable officers in the public service subject to Act 227. But that result would have conflicted with the object of prayers 1 and 2, which was premised on their having retired from the public service. Prayer 5 was for a declaration that Act 239 could not be invoked to deprive the appellants of pension and gratuity upon their retirement. The appellants' aim in seeking the declaration was, I supposed, to remove any obstacles to the granting of the prayer 1 or 2 declaration. Prayer 6, although it professed to be so, was not really for a declaration but for an order to recognize the pensionable status of the appellants. It was merely an ancillary, consequential or residuary prayer.

[12] In oral submission before us in the appeal, the appellants' counsel submitted on only one matter, which he said was the thrust of the appellants' application in the High Court, and that was the question of retirement under s. 12A of Act 227, which was a question that was relevant to prayer 2. Prayer 1 impliedly was abandoned, and rightly too, because the appellants' transfer from the service of the Department to that of the Board was not compulsory. They could have refused to opt for service with the Board and remained with the Department as public officers. Considering the six prayers as I have done, it did appear that, prayer 1 aside, prayer 2 was the thrust of the appellants' application, as their counsel informed us.

[13] The first part of s. 12A(1) – the rest being irrelevant in this case – says:

(1) Subject to subsections (2), (3) and (4) where a pensionable officer being a woman officer who is below forty-five years of age or being a male officer who is below fifty years of age is appointed by or with approval of the Government to serve in any organization howsoever formed and whether or not the Government or any State Government has any interest therein, either directly or otherwise, or in any international organization of which the Government is a member, he may be deemed to have retired from the public service on the date of his leaving the public service …

[14] The appellants' counsel argued that the appellants' transfer of service from the Department to the Board pursuant to their exercise of the option under s. 15 of Act 533, which involved their being appointed employees of the Board, satisfied the requirements of s. 12A(1) as to age and as to its being an appointment with the approval of the Government to serve in an organization, and therefore – construing the word "may" in the section to mean "shall" – they had to be deemed to have retired from the public service on 1 March 1996, the date on which they left the public service.

[15] I decided that the appellants' appeal should be dismissed because I was of opinion that theirs was not a case of retirement under s. 12A(1). I had two reasons for the opinion. Firstly, the word "may" in the section has to mean may. The deeming is not one that is primarily intended, in anticipation of claims by pensionable officers that their case falls under the section, for the court to undertake. It is primarily intended for the Government. The provision is intended to give power to the Government to treat a case of leaving the public service to take up an appointment of the kind specified as a case of retirement from the public service. Normally a case of appointment under the section is pre-arranged with the understanding that it would be a case under the section so that at the time of the Government's appointment of the officer, or giving of the approval for the officer, to serve in the organization it would have been understood on both sides that the officer was considered as retiring from the public service under the section. No case of appointment to serve in an organization can fall under the section unless the Government intended it to be a case under the section. There was no such intention in this case. Secondly, by s. 15 of Act 533,

A Parliament had provided a special avenue for officers of the Department to leave the public service and join the Board. Parliament could not, without so indicating by express words, have intended that the avenue provided by s. 12A(1) should also be applied. If Parliament had so intended there would have been
B some bridging words to link the two sections.

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